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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

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RICHARD G. RANDALL,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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November 2, 1998

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## QUESTIONS PRESENTED FOR REVIEW

1. Was the District Court Judge biased against Petitioner and toward a key defense witness, thereby tainting the proceedings and depriving him of a fair trial?

2. Did the District Court err in denying Appellant's Motion for Mistrial on the basis of the Government's refusal to grant immunity to key defense witnesses whose testimony would likely have been exculpatory to Appellants?

## PARTIES TO THE PROCEEDING

1. Petitioner Richard G. Randall is a former telemarketing sales company owner and operator who was convicted after a jury trial in the United States District Court, District of Arizona.

2. Respondent, United States of America, is a prosecuting branch of the United States Government who charged and obtained convictions against Petitioner.

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Richard G. Randall petitions this Court for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Ninth Circuit affirming Petitioner's convictions and sentences imposed by the United States District Court for the District of Arizona.

## OPINION BELOW

The Ninth Circuit Court of Appeals decision is included as Appendix A.

## JURISDICTION

This Court has jurisdiction pursuant to Rules 10(a) and 13, United States Supreme Court Rules, and the Fifth Amendment to the United States Constitution.

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment Due Process Clause of the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

## STATEMENT

Petitioner Richard G. Randall was a telemarketer who, together with his co-defendant, Donald DiMartini, owned and operated American Choice Corporation (ACC). ACC was a telemarketing company, which solicited customers by telephone to

participate in a purchasing promotion. Although DiMartini, Randall and George Lovett occasionally sold promotions by telephone, they primarily relied upon front and backroom salespeople (front-end loaders and reloaders), an accountant and an attorney to operate the business. They also hired Mary "Mimi" Bundy as office manager, and delegated to her the duty of taping sales representatives' phone conversations with customers in an attempt to monitor and supervise their sales presentations. ACC filed Articles of Incorporation with the State of Arizona and was registered and bonded as required by law.

On November 29, 1995, DiMartini, Randall and Lovett were charged in a superceding indictment with six counts of mail fraud in violation of 18 U.S.C. §§ 134i and 1342 (Counts One through Six), 15 counts of wire fraud in violation of 18 U.S.C. §§

1342 and 1343 (Counts Seven through Twenty-one), one count of conspiracy to money launder in violation of 18 U.S.C. § 1956(h) (Count Twenty-two) and seven counts of money laundering in violation of 18 U.S.C. § 1956 (a)(1)(A)(i);2 (Counts Twenty-three through Twenty-nine). (CR 40). DiMartini and Randall were also charged with three counts of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i);2 (Counts Thirty through Thirty-two) and twenty-five counts of monetary transactions in violation of 18 U.S.C. §§ 1957(a);2 (Counts Thirty-three through Fifty-seven). (Id.). All charges stemmed from alleged unlawful activities in conjunction with ACC.

DiMartini filed two motions to sever trial, both of which were denied by the District Court. (CRs 76, 94). During a

lengthy and complex trial,[1] the defendants made a number of other substantive and procedural motions, most of which were denied by the District Court Judge. These included a motion to suppress, several motions for mistrial, and a motion for reconsideration of the court's ruling barring exculpatory evidence. (CRs 106, 500, 502, 504, 269, RTs 6/25/96 at 2763, 6/27/96 at 2392)

A six-week trial resulted in guilty verdicts on all but three counts for DiMartini and Randall, and in twenty of fifty-two counts for Lovett. (CR 504; RT 7/3/96 at 3286-3288). DiMartini and Randall were each sentenced to 168 months imprisonment on Counts Twenty-two through Twenty-eight, 120 months on Counts Thirty-three through Fifty-seven and 60 months on Counts Two through Twenty-one, all sentences

[1] This case was designated complex pursuant to local Rule 4.14, United States District Court, District of Arizona.

to be served concurrently. (CR 507; RT 10/15/96 at 301-02, 324). They were also each ordered to pay restitution jointly and severally, totaling over 3.2 million dollars. (Id.).

Lovett was sentenced to 46 months for each count, to be served concurrently. (CR 507; RT 10/16/96 at 357-58). He was also ordered to pay restitution totaling $103,700.00. (Id.). DiMartini, Randall and Lovett all appealed from their convictions and sentences to the Ninth Circuit Court of Appeals. (CRs 400, 402, 404).

DiMartini, Randall and Lovett jointly raised ten issues to the Ninth Circuit. DiMartini additionally raised one issue individually regarding speedy trial rights, and Lovett raised three additional individual issues. The issues raised to the Ninth Circuit include the two (2) issues presented to this Court, both of which were raised to

the Ninth Circuit on a motion for rehearing. The Ninth Circuit affirmed the judgments and sentences of all three defendants. (Appendix A). That court subsequently denied a motion for rehearing. (Appendix B).

## REASONS FOR GRANTING THE PETITION

### 1. Judicial Bias

As this case progressed through district court, it became increasingly apparent to the defendants and their attorneys that the District Court Judge was biased against telemarketers. The extent of the Judge's bias did not become fully manifest, however, until defense counsel began presenting witnesses and evidence at trial.

The clearest examples of the Judge's bias are illustrated by his conduct toward defense witness, Mr. Alan Pick, an attorney retained by ACC whose office specialized in providing advice for telemarketing companies.

Mr. Pick was a Stanford Law graduate who worked three years with the Antitrust Division of the Justice Department in Washington, D.C., and twenty-three (23) years in private practice, specializing in antitrust law and unfair competition. He began representing telemarketers in 1984.

The following are examples of the Judge's interactions with Mr. Pick:

> THE COURT: If he is the big expert that he claims to be, I would think he might know that, arguably, tell the clients "you can't pay out those kind of percentages in a legitimate business." . . .
>
> MR. MAYNARD: I want to make a record, and I think this witness was brought in as legal counsel to discuss what -
>
> THE COURT: He didn't give any counsel, as I understand it, seriously. His law clerk, a one-year student, is the one that gave all of that advice. . . .
>
> MR. MAYNARD: . . . His testimony has been that although his law clerk, his work is reflected on the bills, that he reviewed his law clerk's work.

THE COURT: See who dictates the letters and the ones that have notes on them, who dictated them. As far as I am concerned, he can be cross-examined about anything that he wants to, that is relevant to his opinion and his expertise. And it seems to me these questions are relevant. He is dodging them all as best he can.

(CR 494; RT 6/18/96, at 2527-28).

And later that same day:

THE COURT: I think they are entitled to test his opinion and why ever he came over here, and what he got his $25,000 for, and maybe when he gets done, the jury will or won't believe him. But you brought this guy, seemingly as a star witness, whether a star or not, in any event, you brought him in. You heard him testify. You heard the way he answers questions. He doesn't respond to them. He says whatever he wants to. And I think they are entitled to ask questions of him to demonstrate what he does know, and what he doesn't know and when. You did the same thing with all of these people you had. When you had a chance to run with them, you tried to do the same thing, like the IRS agent. You wanted to make him a witness on everything in the world you did.

MR. MAYNARD: Your honor, no, no. Your honor, you didn't even let me

crawl with him, much less run with him. There is a double standard being applied here.

THE COURT: The motion for mistrial is denied.

(Id. at 2557-58).

Later, the Judge's bias became increasingly apparent:

THE COURT: Some things I'm going to ask this gentleman, I suppose, at the end of his testimony, not for the jury's sake, but for my understanding of what he's doing and what's been done with respect to this case and this law clerk, with one year experience doing these different things, and how it is being done, and what this witness has said about some of these events. This witness, giving a suggestion as to whether he is at a place or not, when I don't know that he is or not. And I'm interested in that. I didn't bring him here and I want to find out before he leaves, not for the benefit of the jury, but for the benefit of myself.

MR. MAYNARD: Your honor, this is fine, but I believe the witness has been very straightforward and candid in his answers.

THE COURT: Well, we may perceive that differently, but again, I'm not the trier of fact. And all I

want to do is, to have a record, for whatever.

MR. MAYNARD: That's fine.

THE COURT: All right.

THE WITNESS: I hope by saying that, you weren't saying in any way that I am being dishonest or deceptive with the Court.

THE COURT: I don't know whether you are or not.

THE WITNESS: I am sorry that you think there is even a question about that, to tell you the truth.

(Id. at 2574-2575). The Judge then rose without warning and walked off the bench without comment. After the Judge returned, the following occurred:

THE COURT: All right. We have to wait for Bobbi to come back.

(The witness retakes the stand.)

THE WITNESS: Your honor, I would like to say, with all due respect, that I think it is very unfair for you to make statements about my honesty.

THE COURT: I don't know that I did.

THE WITNESS: Well, the statements

> that you made, I think were very unfair, especially in light of when we attempted to discuss them, you got up and walked off the bench. I think, with all due respect, it is extremely unfair for you to do that. If you have questions that you want to ask me, I will be glad to answer them, on or off the record
>
> THE COURT: I don't ask questions off the record.
>
> THE WITNESS: I don't know, but frankly, anybody reading this transcript, I think would draw the fair inference that you were questioning my honesty, and I think that is extremely unfair for you to do that, especially when you get up and walk off the bench when we attempt to discuss it.
> . . .
> . . .
>
> MR. MAYNARD: . . .
> Additionally, I do think the Court's comments to Mr. Pick were intended to intimidate the witness. I think they were totally inappropriate.
>
> THE COURT: All right. The record reflects your comments as well.

(Id. at 2576-78).

The next day, the Judge expressed his intent to examine Mr. Pick regarding

attorneys' fees, allegedly for CJA purposes. (CR 499; RT 6/19/96, at 2622-23). He later did so. (CR 500; RT 6/25/96 at 2814-2821). Prior to that examination, the Judge made the following comments:

> THE COURT: . . .
> Yet he (Mr. Pick) comes here, he doesn't know squat from diddly about the statute, or anything else.

(Id. at 2640).

> THE COURT: He's already told you he does not recall what they were charged with, et cetera, et cetera. So maybe that will refresh his recollection about that as well. But, in any event - and Mr. Pick, I don't want to - and I'm sitting up here now, you made comments about my leaving. I can get up and leave when I choose to, period.
>
> THE WITNESS: I know.
>
> THE COURT: And the record reflects what we were doing and what I was doing, so that is another matter that I don't want to get into as well. But just answer the questions.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: You are not a

> defendant, you are here to be a witness. Your lawyer can ask you questions. You are not a lawyer here, like it or not, you are a witness. So just remember that and we will move along and not have those problems.
> . . .
> . . .

(Id. at 2643-44).

The Judge's increasing hostility toward Mr. Pick later became apparent before the jury as well, after the Judge allowed the prosecutor to continue asking questions regarding a letter the witness said he had not seen. (Id. at 2700-01).

When the Government had yet to complete its cross-examination of Mr. Pick after one and one-half full days of cross, Mr. Pick had to return home for a prior commitment to be with his sister for cancer surgery. (Id. at 2707-08). Although defense counsel had notified the Government and the Judge regarding this prior commitment, the Judge "examined" Mr. Pick regarding the

circumstances. (Id.). He then showed little compassion for those circumstances, by nearly threatening Mr. Pick to return as scheduled with contempt of court:

> THE COURT: . . .
> Now, Mr. Lacy can - he's [Mr. Pick's] going to back on Tuesday in absence of some showing about why he can't be here, and he's going to be here Tuesday at 9:00 o'clock in the morning, and he's going to go on. Now, that is about the substance of that.
>
> MR. MAYNARD: Let me just finish. Your Honor, I advised you earlier that he has a sister who is in surgery on Tuesday.
>
> THE COURT: What time?
>
> THE WITNESS: Actually the surgery is Monday. It is cancer surgery, Your Honor. And I promised my sister that I would be there.
>
> THE COURT: How old is your sister?
>
> THE WITNESS: My sister 45.
>
> THE COURT: She has a husband?
>
> THE WITNESS: Yes, she does.
>
> THE COURT: Is her mother alive?
>
> THE WITNESS: No.

> THE COURT: Well, he will be here then at 1:30 on Tuesday and go on. Now that is the substance of that. I'm not going to get in, one way or another, he can be here and he is ordered to be here. If he doesn't like it, then that is another problem. But we are going to that, Mr. Maynard, because this is going to stop. This witness is going to stop sometime. I don't know what the government proposes to do with him or not, but that is going to happen. And it is going to happen at 1:30 on Tuesday. If he doesn't choose to be here at 9:00 o'clock on Tuesday. And if he isn't here at 9:00 o'clock on Tuesday, you have another witness ready to go at 9:00 o'clock on Tuesday. That is that. I said I wanted to discuss some matters with the witness regarding the billing and the legal fees. And again, I'm going to do that after the cross-examination is completed and it will take about 15 minutes. Okay?
>
> . . .
>
> . . .

(Id. at 2707-08).

The following Monday, during a status conference, counsel for DiMartini reported that Mr. Pick had called to say that his 90-year-old father had also been hospitalized

and that he may or may not be able to arrive on Tuesday as scheduled. (CR 499; RT 6/24/96, at 2709-10). The judge had the following response:

> THE COURT: This is for you to decide. I entered an order that he be here at 9:00 o'clock tomorrow and if he wasn't here at 9:00 o'clock, he would be here at 1:30. And that is an order of the Court.
>
> MR. MAYNARD: Your Honor, he is not my - I mean, he is my witness, he is not my client. He is a lawyer.
>
> THE COURT: He decides whether he comes or not and I decide if he is not here what is going to happen.
>
> MR. MAYNARD: I understand.
>
> THE COURT: And you tell him not to call me.
>
> . . .
>
> MR. LACY: Your Honor, a few things I suggested to counsel were -
>
> THE COURT: I don't want to discuss Mr. Pick's situation. If you want to arrive at some stipulation with them, that is your business, not mine. I'm not here to negotiate anything in that regard.

(Id. at 2712-13). When Mr. Pick arrived back to testify at 1:30 p.m. Tuesday as scheduled, the Judge referred to him as a "lucky man." (CR 500; RT 6/25/96 at 2730). He continued making comments and suggestions about this witness throughout the remainder of his testimony.

These comments and suggestions by the Judge, as well as his intimidation and repeated direct examinations of and "dialogues" with Mr. Pick, finally led DiMartini's attorney to state the following on the record in response to the Judge and to ask for a mistrial:

> THE COURT: I don't know that it would, because I'm not sure he ever saw whatever he is doing, seriously. That is the impression I get from what he testified to here and briefly reviewing his testimony in Santa Ana.
>
> MR. MAYNARD: Your Honor, obviously we have a difference of opinion. I think the Court is making a comment on the evidence at this point.

THE COURT: I'm permitted to do that, and particularly out of the presence of the jury. I can comment before the jury, I suppose, but I am telling you my assessment of reading his testimony and hearing his testimony. He never answered a question directly that was asked of him. He always added something. The government didn't object, but he was always throwing in a little - a little boost, "Oh, we always do that," or "That is a part of our practice." Or, "certainly, we did this or that."

. . .

. . .

MR. MAYNARD: Your Honor, I'm going to move for a mistrial again. You are now becoming an advocate for the state (sic). When we are off - not off the record, but when we are in here outside of the presence of the jury, you make comments about witnesses who are currently on the stand, who is going to be back on this afternoon, in my opinion you are giving the government ways that they should be cross-examining this particular witness. And I think that is inappropriate. And I move for a mistrial.

THE COURT: The motion is denied. I haven't done anything in the sense of interjecting myself into the government's case, or asking questions, or shutting the witness

up, or anything like that.

MR. MAYNARD: Your Honor, you have made -

THE COURT: That is the government's position.

MR. MAYNARD: You have made comments about the character of my witness. You have made comments about his truthfulness, his veracity. You have commented about how he's testified, what he said, whether the government has made objections to it or not. I think the Court has stepped into the role of the prosecutor in its comments. That is the basis for my motion for mistrial.

THE COURT: Your motion is made and denied.

(Id. at 2762-64).

During and after these exchanges and motions for mistrial, virtually all objections raised by defense counsel were either completely or substantially disregarded. (CRs 494, 499, 500; RTs 6/18/96 at 2507-2617, 6/19/96 at 2627-2709, 6/25/96 at 2772-2794, 2806-2821). The Judge also permitted unduly prejudicial inflammatory and

irrelevant evidence to be admitted against defendants. During direct examination of Kevin Kerivan, the Government elicited testimony that DiMartini and Randall entertained or rewarded sales representatives by taking them out to "strip clubs." Such tactics are clearly improper. Rule 403, Federal Rules of Evidence, *United States v. Millen*, 594 F.2d 1085, 1088-89 (6th Cir.), *cert. denied* 444 U.S. 829 (1979). Yet, the Judge excluded evidence that Randall attended church regularly.

The Judge also allowed over repeated defense objection irrelevant and inflammatory testimony that ACC customers borrowed money from credit cards or other sources or delayed paying other bills to finance their purchases of merchandise from ACC. This evidence should not have been admitted, as it did not make any fact relating to any charge in this case more or less probable. *See* Rule 403.

It was also unduly prejudicial, as it likely tended to make the jury feel undue sympathy for ACC customers. *Id.*

At the close of trial, the Judge also refused to give three key instructions proposed by defense counsel. The Judge would not instruct the jury on the difference between "puffing" (an accepted American sales practice) and unlawful misrepresentation. (CR 502, RT 6/27/96 at 2930). He also failed to give an instruction regarding the required culpability of a business owner for actions of his or her sales representatives. (CR 502; RT 6/27/96 at 2944-71). Finally, the Judge suggested jury instructions to the Government and gave an instruction no one had requested that was potentially prejudicial to Appellants. (CR 501; RT 6/26/96, 2879-80, 2884-2895).

The central issue before this Court is whether Randall received a fair trial in an

impartial forum. The trial transcripts, including the foregoing excerpts, reflect a pervasive, albeit insidious, bias toward Randall and his co-defendants by the District Court Judge. This bias tainted the entire trial process and calls into question the validity of the District Court Judge's rulings throughout trial.

Although the Judge was careful to not make comments in full view and hearing of the jury, his bias was so pervasive that it necessarily had an impact on the courtroom environment and its participants.

> A judge's participation justifies a new trial [] if the record shows actual bias or leaves an inviting impression that the jury perceived an appearance of advocacy or partiality.

*United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988), *cert. denied* 492 U.S. 906 (1989); See also *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986).

The record in this case reflects actual bias, which should have caused the Judge to disqualify himself. *See* 28 U.S.C.A. § 455(a); *see also Liteky v. United States*, 510 U.S. 540 (1994) (recusal is required whenever impartiality might reasonably be questioned). The fact that most of the Judge's displays of bias occurred at sidebar or outside the presence of the jury does not mean that these proceedings were free from the taint of partiality. And the apparent absence of a financial or personal interest does not mean there was no actual bias. *See Liteky* at 551-52 (extrajudicial source is not the only basis for establishing disqualifying bias or prejudice).

In *United States v. Harris*, 501 F.2d 1 (9th Cir. 1974), the Ninth Circuit concluded that a trial court judge had over-stepped his bounds by participating in trial in a way that unduly aided the prosecution. Where the

"cumulative effect of the trial court's excessive participation in examining witnesses on behalf of the government, coupled with unnecessarily severe restraints imposed on defense counsel in their attempt to cross-examination [witnesses] could have influenced the jury adversely [,]" the court has committed reversible error. *Id.* at 11.

Here, the Ninth Circuit panel reasoned that the District Court Judge's comments were not made in the presence of the jury and that they therefore did not jeopardize Randall's right to a fair trial, citing *United States v. Rutguard*, 116 F.3d 1270 (9th Cir. 1997). In *Rutguard*, however, only one inappropriate comment was made by the judge. That is hardly akin to the pervasive bias demonstrated by the Judge throughout this case.

If nothing else, "justice must satisfy the appearance of justice." *Marshall v.*

*Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The appearance of justice was clearly not satisfied in this case. This Court should therefore reverse and remand for a new trial before a new, impartial judge.

**2. Immunity**

Four former ACC sales representatives received plea bargains from the Government in exchange for their testimony against Randall, DiMartini and Lovett. These were Kevin Kerivan, Joel Kleiman, Morgan Trzaskos and Craig Hewitt.

Defense counsel identified three key defense witnesses, none of whom were indicted by the Government. All three were former ACC employees. One, Mary "MiMi" Bundy, was hired for the specific purpose of supervising the sales representatives to ensure they made no misrepresentations. A significant part of her duties was to listen to tapes of the

sales representatives telephone conversations with customers and to discuss potential misrepresentations and/or other problems with them. Evidence at trial indicated that Randall, DiMartini and Lovett relied upon Ms. Bundy to do her job, but that she neglected to fulfill those supervisory functions.

The Government called Ms. Bundy as a witness, but the District Court Judge warned her that her testimony could jeopardize her penal interest and properly instructed her on her Fifth Amendment right not to testify. The Judge subsequently appointed an attorney to represent her, who later communicated her intent not to testify.

Defense counsel requested the Government to grant Ms. Bundy immunity so that she could testify for the defense. The Government refused. (CR 490; RT 6/5/96 at 1422-1455). Ms. Bundy's testimony was necessary to a complete defense, because her

role and fulfillment of her duties were highly relevant to the issue of the defendants' knowledge and culpability. Her testimony would likely have directly contradicted the Government's witnesses and exculpated the defendants.

Similar, though less egregious, scenarios developed with Donna Anderson and Doris Warren. In all three cases, the Government refused to grant immunity, leaving those potential witnesses vulnerable and with no choice but to invoke their Fifth Amendment rights against self-incrimination.

This scenario requires a new trial. *United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983). Where the Government relies upon the testimony of a witness to whom it grants immunity and who testifies as part of a plea bargain, it violates due process to deny similar immunity to a defense witness whose testimony would directly contradict the

testimony of the Government witness. *Id.*; *United States v. Pennell*, 737 F.2d 521, 526 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Franz*, 697 F.2d 188, 191 (7th Cir.), *cert. denied*, 464 U.S. 828 (1983); *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 968-69, 974 (3rd Cir. 1980); *United States v. Klauber*, 611 F.2d 512, 517-18 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Earl v. United States*, 361 F.2d 531, 534 n. 1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

To do otherwise creates a distorted fact finding process, which is not favored under the law. *Lord*, 711 F.2d at 891. That is exactly what occurred here. By refusing to grant Ms. Bundy immunity, the Government successfully prevented the defendants from

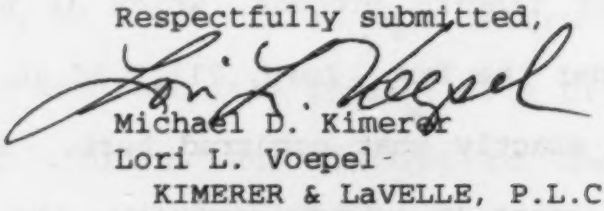
contradicting or disputing the most powerful evidence against them. The same is true regarding Ms. Anderson and Ms. Warren.

This Court has yet to address the issue of whether the foregoing scenario violates due process. *E.g., Hunter v. California*, 498 U.S. 887 (1990) (Marshall, J., dissenting); *Autry v. McKaskle*, 465 U.S. 1085 (1984) (same). This Court should take this opportunity to answer this very critical question in the affirmative.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to reverse and remand this case for a new trial before a new and impartial district court judge.

Respectfully submitted,



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November 2, 1998

## APPENDICES

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| Appendix A | Memorandum Decision, Ninth Circuit Court of Appeals |
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Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA, | ) | No. 96-10488 |
| | ) | 96-10507 |
| Plaintiff-Appellee, | ) | 96-10508 |
| | ) | |
| v. | ) | |
| | ) | MEMORANDUM* |
| GEORGE LOVETT, RICHARD RANDALL, and DONALD A. DiMARTINI, | ) | |
| | ) | |
| Defendants-Appellants. | ) | |

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted January 14, 1998
San Francisco, California

Before: CHOY, SCHROEDER, and NOONAN, Circuit Judges.

**Introduction**

Appellants Donald A. DiMartini ("DiMartini"), Richard G. Randall

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

("Randall"), and George Lovett ("Lovett") appeal their jury conviction for mail fraud and wire fraud stemming from their operation of American Choice ("ACC"), a telemarketing company which solicited customers to participate in purchasing promotions.

We AFFIRM in all respects.

**Analysis**

I. Separate Trials

Appellants argue that they were improperly denied separate trials. However, Appellants failed to preserve any potential error for an appeal.

It is well established that a motion for severance must be renewed at the close of evidence or it is waived. *U.S. v. Restrepo*, 930 F.2d 705, 711 (9th Cir. 1991) Granted, the renewal requirement is considered an "unnecessary formality" as long as the movant demonstrates "diligent pursuit." *U.S. v. Kaplan*, 554 F.2d 958, 965-66 (9th Cir. 1977).

Yet other than a general assertion that the district court made it clear before and throughout the trial that it would not grant a motion to sever, Appellants fail to offer specific instances of "diligent pursuit." *See, e.g., U.S. v. Vasquez-Velasco*, 15 F.3d 833, 845 (9th Cir. 1994).

II. Motion to Supress

Appellants argue that the Government impermissibly exceeded the scope of the search warrant by seizing virtually all of ACC's records. We disagree.

In this case, there was probable cause to believe that the alleged fraud permeated ACC in its entirety, justifying the general seizure which shut down the telemarketing operation. *See U.S. v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374 (9th Cir. 1983).

Appellants respond that *50 State Distrib. Co.* addressed whether the search

warrant itself was overbroad, not whether the execution exceeded the warrant's terms. Appellants argue that the terms of the warrant were limited to eight named victims.

However, the district court correctly concluded that the work "victim" as used in the search warrant was not intended to limit the documents seized to those relating to the named victims who had been previously defrauded by ACC. The Government was also interested in how the operations were conducted, who else had been contacted, and who might be contacted in the future. Accordingly, the affidavit depicted an entire business permeated with fraud which had victimized at least 47 people, only eight of whom were named.

III. Refusal to Grant Immunity to Defense Witnesses

Appellants assert that they were denied a fair trial because the Government refused

to grant immunity to proposed defense witnesses Mary "MiMi" Bundy ("Bundy"), Donna Anderson ("Anderson") and Doris Warren ("Warrant"), leading each to invoke her Fifth Amendment right.

Generally, criminal defendants cannot compel the Government to grant immunity to a witness. *U.S. v. Young*, 86 F.3d 944, 947 (9th Cir. 1996). However, defendants qualify for an exception to this rule upon showing that: 1) the testimony was relevant; and 2) the Government distorted the judicial fact-finding process by denying immunity. *Id.*

Nonetheless, Appellants fail to satisfy this two-part test.

IV. Exclusion of Mary Muchmore's Hearsay Testimony

Appellants planned to have Mary Muchmore testify regarding statements made by Bundy which included an admission that she had failed to listen to tapes of ACC sales

representatives.

Although the testimony would have been hearsay, Appellants argued that Bundy's admission constituted a statement against her penal interest under Rule 804(b)(3) of the Federal Rules of Evidence. Independently, Appellants argued that Bundy's admission should have been admitted as proof of "third-party culpability." *See Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983).

We find no merit to these claims.

V. Conduct to District Judge

Appellants allege that the district judge exhibited a high level of bias against them and a key defense witness, Alan Pick ("Pick"). Although the district judge demonstrated irascibility, he did not jeopardize Appellants' right to a fair trial. Significantly, most of the judge's remarks and conduct occurred outside the presence of the jury. For example, the jury was not

present for the exchange concerning Pick's honesty in which the judge unexpectedly left the bench. Neither was the jury present when the judge showed little regard for this court. "I may be in serious trouble with the Ninth Circuit, and that is not my problem or my concern, I try to do what is right."

Not only were these comments made outside the jury's presence, they did not amount to actual bias. *See U.S. v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997). Moreover, any bias which the jury might have detected was cured by the instruction to the jury not to read into anything that the judge had said or done. *See U.S. v. Sanchez-Lopez*, 879 F.2d 541, 553 (9th Cir. 1989).

In short, while the district judge's remarks and behavior were less than admirable, there is no clear indication of actual bias or that the jury perceived partiality.

VI. Jury Instructions

A. Corporate Officer Liability Instruction

Appellants argue that the district court's jury instruction on officer liability violates *U.S. v. Gibson*, 690 F.2d 697, 701 (9th Cir. 1982). But the language chosen by the district court more than adequately captures the standard in *Gibson*.

B. "Puffing" Instruction

Appellants argue that it was improper for the district court to exclude their "puffing" instruction which distinguished exaggerated statements of opinion as a sales technique from false statements of fact.

However, in *U.S. v. Gay*, 967 F.2d 322, 329 (9th Cir. 1992), this court upheld the rejection of a similar "puffing" instruction, finding that a "good faith" instruction adequately conveyed the gist of a "puffing" defense. Therefore, the district court's

inclusion of an instruction on good faith as a complete defense made it unnecessary in this case to include Appellants' "puffing" instruction.

C. Lovett's Withdrawal Instruction

Appellant Lovett argues that the district court misstated the law when it included a jury instruction requiring him to take some "affirmative act" in order to prove withdrawal.

The district court issued the following instruction on withdrawal:

> It is a defense to Count 2 through 21 of the indictment that a defendant withdrew from the scheme.
>
> In order to withdraw from the scheme, a defendant must take some definite, decisive, and affirmative action to disavow himself from the scheme or to defeat the goal or purpose of the scheme.
>
> Merely stopping activities or cooperation or merely being inactive for a period of time is not sufficient to constitute the defense of withdrawal. . .

> In deciding if a defendant took a step to disavow or defeat the scheme, you may consider several factors including whether the defendant intentionally alerted law enforcement to the scheme, whether the defendant told others I the scheme that his participation had ended, whether the defendant took steps to correct prior assistance ot the group, and whether the defendant attempted to remedy any past act, or attempted to prevent any further progress of the scheme.

Lovett argues that the above instruction contradicts the law in *U.S. v. Lothian*, 976 F.2d 1257, 1261 (9th cir. 1992), which defines withdrawal as follows: "To withdraw from a conspiracy a defendant must either disavow the unlawful goal of the conspiracy, affirmatively act to defeat the purpose of the conspiracy, or take 'definite, decisive, and positive' steps to show that the [defendant's] disassociation from the conspiracy is sufficient."

Although the district court in this case changed the language and sequence somewhat, it adequately captured all three

methods of withdrawal. Therefore, the district court did not misstate the law in its withdrawal instruction.

However, the question remains whether the withdrawal instruction as a whole was misleading. Lovett correctly points out that an employee's resignation, after which he receives no financial benefit from the company, is prima facie evidence of withdrawal. *Lothian*, 976 F.2d at 1264.

Unfortunately, the district court in this case did not include resignation as an example of withdrawal. Nonetheless, we do not believe that the district court abused its discretion. Despite its choice of examples, the district court did not expressly exclude resignation as evidence of withdrawal. Apparently no better language was proposed, and this court in *Lothian* did not require that resignation be expressly highlighted for the jury. Hence, the

withdrawal instruction is not a ground for reversal, even though it was less than ideal.

VII. Government Conduct During Closing

Appellants requested a mistrial because the Government showed the jury during closing two exhibits which were not in evidence. First, Appellants complained about the Government's display of Exhibit 449, a complaint letter written by Louis Benthack. But this error was not inflammatory.

Additionally, Appellants complain about the Government's display of two checks showing payment to Lovett. One check had been admitted into evidence as part of Exhibit 21C. Although the other check had not been admitted, that payment to Lovett was evidenced elsewhere - in Exhibit 4E. Thus, it was not prejudicial when the jury asked a question about check.

VIII. Sufficiency of the Evidence

Appellants attempt to undermine the

validity of the jury's verdict. First, they question the credibility of several Government witnesses. But we find no basis to declare these witnesses per se unreliable, even if some of them testified pursuant to plea agreements with the Government. Furthermore, Appellants are unconvincing in arguing their lack of knowledge of their sales representatives' misrepresentations.

IX. Sentence Enhancement

Section 3A1.1 of the U.S. Sentencing Guidelines instructs courts to increase a sentence by two levels "[I]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct. . ." U.S. Sentencing Guidelines Manual § 3A1.1(b) (1997).

Appellants confuse the issue by arguing

that § 3A1.1 does not apply to them under *U.S. v. Castellanos*, 81 F.3d 108 (9th Cir. 1996). There, this court held:

> The appellate courts have consistently refused to find a class of victims to be particularly susceptible to criminal conduct simply because they were statistically more likely to fall prey to defendant's crime. . .
>
> Especially in cases involving some kind of scheme to defraud, the criminal will typically direct his activities toward those persons most likely to fall victim to the scheme. But all defendants targeting such victims do not necessarily merit a sentence enhancement under § 3A1.1. Otherwise, all but the most unthinking of criminal defendants would be candidates for upward adjustment under § 3A1.1. Instead, the victims to whom § 3A1.1 applies are those who are in need of greater societal protection.

*Id.* at 110-11.

Appellants imply that although many of the victims were elderly, that fact alone is insufficient for enhancement under *Castellanos* -- even if statistics show that the elderly are more likely to participate in telemarketing activities.

But this court's concern in *Castellanos* was made in reference to the "particularly susceptible" prong, not the "unusually vulnerable" prong set forth in the guidelines. With regard to the latter, this court noted that the distinction in § 3A1.1(b) between "unusually vulnerable" and "particularly susceptible" suggests that the characteristics of age "may per se render a victim worthy" of special protection. *Id.* at 110. Therefore, the relevant inquiry in this case should not be whether the elderly per se as a class constitute vulnerable victims, but whether the Appellants targeted the elderly.

Indeed it appears that the Appellants deliberately targeted the elderly. For example, Appellants specifically suggested that sales representatives "cherry pick" customers with older-generation names like Hazel, Mabel, and Gladys. Moreover, there were various questions devised in order for

representatives to assess the age of prospective consumers.

Although the precise percentage of victims that were elderly is in dispute, this case in unlike the situation "where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile." (U.S. Sentencing Guidelines at Comment 2.) Here, Appellants' victimization of the elderly was much more than coincidence, justifying sentence enhancement under § 3A1.1.

X. DiMartini's Speedy Trial Right

Under 18 U.S.C. § 3161(c)(1), a defendant's trial must commence within 70 days from the date of the indictment or initial court appearance, whichever occurs later. Since the last codefendant was arraigned on January 25, 1996, DiMartini calculates that he should have been tried by April 4, 1996.

In postponing the trial from February 14, 1996 through May 21, 1996, the district court relied on § 3161(h)(8)(A) - the "ends of justice" exception. On appeal, DiMartini argues that the district court failed to satisfy this exception's requirements. *See U.S. v. Clymer*, 25 F.3d 824, 828 (9th Cir. 1994).

Regardless, we need not decide whether the district court satisfied the "ends of justice" exception. We find an alternative basis for excludable delay. Specifically, Section 3161(h)(1)(F) exclude "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." *See U.S. v. George*, 85 F.3d 1433 (9th Cir. 1996).

On January 24, 1996, DiMartini filed a motion to suppress evidence. This motion was not decided until 61 days later, on March 26,

1996. Under § 3161(h)(1)(F), these 61 days were properly excludable. Thus, DiMartini's right under the Speedy Trial Act was not violated.

In a footnote, DiMartini argues that his right to a speedy trial under the Sixth Amendment to the U.S. Constitution was also violated. Applying the four-factor test given in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), we find no constitutional violation. In particular, we note that DiMartini's failure to prove prejudice pursuant to *Barker* is not excused by *Doggett v. U.S.*, 505 U.S. 647 (1992).

XI. Lovett's Closing Argument

Appellant Lovett contends that the district court improperly restricted his closing argument. He wanted to argue that the Government's failure to play recordings of his sales pitches suggests that the tapes would have shown that the Appellant had not

made any misrepresentations.

Granted, the Government's failure to produce relevant evidence within its control gives rise to an inference that the evidence would be unfavorable to it. *U.S. v. Tory*, 52 F.3d 207, 211 (9th Cir. 1995). However, the district court did not abuse its discretion in finding that there was no evidence in the record that tapes of Lovett's sales even existed. Although other sales representatives had testified about their individual experiences with being recorded, there was no direct evidence that Lovett himself had been recorded. When asked, no witness had heard tapes of Lovett specifically.

XII. Lovett's Cross-Examination of Special Agent David Ramey

Appellant Lovett contends that the district court erred in limiting his cross-examination of Special Agent David Ramey

("Ramey"). However, in cross-examining Ramey, Lovett was not attempting to impeach the witness or directly contradict the Government's evidence. More importantly, Appellants concede that Ramey could have been called as a defense witness and questioned then.

In short, this was not a situation where Lovett was precluded from presenting a defense; the district court simply controlled the method by which Lovett raised his defense.

AFFIRMED.

Appendix B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | No. 96-10488 |
| | ) | 96-10507 |
| Plaintiff-Appellee, | ) | (consolidated) |
| | ) | |
| v. | ) | |
| | ) | |
| | ) | O R D E R |
| GEORGE LOVETT, RICHARD RANDALL, and DONALD A. DiMARTINI, | ) | |
| | ) | |
| | ) | |
| | ) | |
| Defendants-Appellants. | ) | |
| | ) | |

Before: CHOY, SCHROEDER, and NOONAN, Circuit Judges

The petition for rehearing is DENIED.

Appendix C

UNITED STATES DISTRICT COURT

District of Arizona

| | | |
|---|---|---|
| United States of America | ) | JUDGMENT IN A CRIMINAL CASE |
| V. | ) | |
| RANDALL, RICHARD G. | ) | Case Number CR 95-320-02 PHX EHC |

THERE WAS A:

___finding **X** verdict of guilty as to counts(s) 2 - 28 and 33 - 57

___finding **X** verdict of not guilty as to count(s) 30-32

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title 18, U.S.C., Section 1341 & 2 - Mail Fraud, Counts 2-6, a felony offense

Title 18, U.S.C., Section 1343 & 2 - Wire Fraud, Counts 7-21, a felony offense

Title 18, U.S.C., Section 1956 (h), Conspiracy to Money Launder, Count 22, a felony offense

Title 18, U.S.C., Section 1956(a) and 2 Monetary Transactions, Counts 33-57, a felony offense

IT IS THE JUDGMENT OF THIS COURT THAT:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that

the defendant, Richard G. Randall, is hereby committed to the custody of the Bureau of Prisons for a term of 168 months on Counts 22-28 concurrently, terms of 120 months on Counts 33-57 concurrently, 60 months on Counts 2-21, all to be served concurrently. Further, the defendant shall pay a special assessment of $2,600., due immediately. While incarcerated, payments shall begin under the Bureau of Prisons Inmate Financial responsibility Program. Payments shall be made to the Clerk, U.S. District Court. The court is not ordering a fine or cost of incarceration based upon the amount ordered for restitution and the possibility that the defendant may be ordered to reimburse the Government for counsel appointed from the Criminal Justice Act for attorney fees. Further, the defendant shall pay restitution in the amount of $3,244,577.04, jointly and severally with Donald Dimartini, to the victims identified in the attachment to the presentence report, excluding those persons who didn't provide funds due to insufficient checks, stop payment checks, refunds and to reflect a 20% reduction in the gross revenues because of the cost of items that the victims received. Restitution is due immediately, and if not paid, in regular monthly installments. While incarcerated, payments shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the U.S. Attorney's Office, Financial Litigation Unit and pro-rated to the victims. Upon release from imprisonment, the defendant is placed on supervised release for a period of 3 years as to each count, all counts to be concurrent. Within 72 hours of release from custody by the Bureau of Prisons, the defendant shall report in person, to the probation office in the district to which he is released.

While on supervised release, the defendant shall comply with the standard conditions of supervision as adopted by the court in General Order 201 and the following special conditions:

1. The balance of any financial obligation ordered by the Court shall be paid in regular monthly installments approved by the probation officer. Full amount to be paid 90 days prior to the expiration of supervision.

2. Defendant shall participate as instructed by the probation officer, in a program of substance abuse treatment, which may include testing for substance abuse. The defendant shall contribute to the cost of treatment in an amount determined by the probation officer.

3. Further, the defendant shall submit to search of person, property, vehicles, business and residence, to be conducted in a reasonable manner and at a reasonable time, by, or at the direction of the probation officer.

4. Further, the defendant shall provide the probation officer access to any requested financial information.

5. Further, the defendant is prohibited from making any major purchases or incurring financial obligations or entering into any financial contract without prior approval of the probation officer.

6. Further, the defendant is restricted in engaging in the following occupation, business or profession, that is, telemarketing.

Defendant is advised of his right to appeal the imposed sentence by filing a notice of appeal within 10 days of this date.

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work, notify your probation officer at once and consult him prior to job changes);

(4) not leave the judicial district without the permission of your probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow your probation officer's instructions, report as directed, and comply with any general or special conditions pursuant to District of Arizona General Order 201.

The court may change the conditions of probation or supervised release or extend the term of supervision, if less then the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a

violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the defendant shall immediately pay to the Clerk of the Court a total special assessment of $2,600.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 2-28, 33-57 as follows:
see body of judgment and commitment

IT IS FURTHER ORDERED that counts none are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States Attorney for this district any amount imposed as restitution. The defendant shall pay to the Clerk of the Court any amount imposed as a fine and as a cost of prosecution. Payment of such amount is due immediately but, if so ordered shall be payable in equal monthly installments with payment in full by a date certain. In all cases restitution, fines, and costs shall be payable during the period of incarceration with the payment of any remaining balance to be a condition of probation or supervised release. Until all restitutions, fines, special assessments, and costs are fully paid, the defendant shall immediately notify the United States Attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this judgment to the United States Marshal of this district.

DATED October 15, 1996.

/s/
EARL H. CARROLL
United States District Judge